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05 UNITED STATES DISTRICT COURT
06 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

07 KIMBERLY SMITH,) CASE NO. C05-1105-TSZ
08)
09 Plaintiff,)
10)
11 v.)
12) REPORT AND RECOMMENDATION
JO ANNE B. BARNHART, Commissioner)
of Social Security,) RE: SOCIAL SECURITY
DISABILITY APPEAL
Defendant.)
_____)

13 Plaintiff Kimberly Smith proceeds through counsel in her appeal of a final decision of the
14 Commissioner of the Social Security Administration (Commissioner). The Commissioner denied
15 plaintiff's application for Disability Insurance (DI) and Supplemental Security Income (SSI)
16 benefits after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's
17 decision, the administrative record (AR), and all memoranda of record, it is recommended that this
18 matter be REMANDED for further administrative proceedings.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1964.¹ She has a high school equivalency degree (GED).

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22 ¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the
General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the

01 Her past relevant work included employment as an eyewear assembler, a general assembly worker,
02 a cashier, a plastic fabricator, a plant store worker, a bartender, a waitress and a delivery person.

03 Plaintiff filed her first disability benefits application, for SSI only, on September 1, 1986,
04 alleging a kidney impairment with an onset date of November 1982. The claim was denied initially
05 (AR 1981-83) and plaintiff took no further action.

06 Plaintiff then applied for DI benefits on February 28, 1994 and filed a second claim for SSI
07 benefits on October 26, 1994. These claims were denied initially (AR 1985) and on
08 reconsideration (AR 456), and, again, plaintiff took no further action.

09 Plaintiff filed another DI benefits application on March 7, 1996, alleging heart and kidney
10 problems, as well as stress and anxiety, with an onset date of December 28, 1989. (AR 167-70.)
11 The claim was denied initially and upon reconsideration, and plaintiff requested a hearing before
12 an ALJ. After hearing, the ALJ remanded the matter for further development of the evidence
13 relating to mental health and other medical impairments. (AR 127-29.) The claim was again
14 denied. (AR 142-44.)

15 Plaintiff requested a hearing, which was conducted before the same ALJ. In a decision
16 dated June 11, 1999, the ALJ reopened the 1994 DI and SSI claims, considered the testimony and
17 records, and denied the claim, finding plaintiff had severe impairments consisting of provisional
18 somatization and personality disorder, but was able to perform her past relevant work as a cashier
19 and eyewear assembler, as well as other work. (AR 14-40.)

20 Plaintiff appealed the ALJ's decision to the Appeals Council, which denied the request for
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official policy on privacy adopted by the Judicial Conference of the United States.

01 review. (AR 5-7.) She then appealed to this Court. *See Smith v. Barnhart*, No.C00-1226 TSZ.
02 With that appeal pending, plaintiff filed another application for DI and SSI benefits in August
03 2000. (AR 1995-97.) While allowing the SSI application, the Commissioner denied the DI
04 application because plaintiff's disability onset was found to be after her date last insured. The
05 Commissioner conceded error in the appeal of the 1999 decision based on the ALJ's determination
06 of plaintiff's residual functional capacity (RFC) and in the hypothetical posed to the vocational
07 expert. (AR 598.) On May 23, 2001, this Court reversed the 1999 ALJ decision and remanded
08 the case to the Appeals Council (AR 596), which forwarded the case to the ALJ for further
09 proceedings. Specifically, the Appeals Council directed the ALJ to further develop and clarify
10 plaintiff's 1995 employment (whether it was substantial gainful activity or represented an
11 unsuccessful work attempt), to further develop and evaluate the opinion of one of the treating
12 doctors, to allow plaintiff's attorney the opportunity to cross-examine the medical expert, to
13 complete the evaluation of plaintiff's RFC, and to provide supplemental evidence from a
14 vocational expert on the effect of all of plaintiff's assessed limitations on her ability to work. (AR
15 602-05.)

16 Pursuant to the remand, the ALJ conducted a hearing on January 29, 2004, taking
17 testimony from plaintiff, two medical experts (Wil Nelp, M.D., and David Clemmons, Ph.D.), and
18 a vocational expert (Susan Stewart Bachelder). The ALJ re-opened plaintiff's 1994, 1996, and
19 2000 applications (the latter over plaintiff's objection (*see* AR 456)). On March 25, 2004, the
20 ALJ issued a decision again finding plaintiff not disabled. (AR 456-77.) The Appeals Council
21 declined to assume jurisdiction. (AR 439-42.) Plaintiff appealed this final decision of the
22 Commissioner to this Court.

01 Plaintiff's date last insured is September 30, 1996. Therefore, to prevail on her DI claim,
02 she must establish disability on or prior to that date. SSI benefits are not dependent on this date.

03 **JURISDICTION**

04 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

05 **DISCUSSION**

06 The Commissioner follows a five-step sequential evaluation process for determining
07 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
08 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
09 engaged in substantial gainful activity since her alleged onset date. At step two, it must be
10 determined whether a claimant suffers from a severe impairment. The ALJ found that plaintiff had
11 "an impairment or a combination of impairments considered 'severe,'" but did not specify the
12 severe impairments found. However, the ALJ did find that "claimant's drug abuse is a material
13 factor of her disability *without which* she is not disabled." (AR 475 (emphasis in original.)) Step
14 three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found
15 that plaintiff's impairments did not meet or equal the criteria for any listed impairments. If a
16 claimant's impairments do not meet or equal a listing, the Commissioner must assess RFC and
17 determine at step four whether the claimant has demonstrated an inability to perform past relevant
18 work. The ALJ found plaintiff able to perform her past relevant work as a waitress and cashier.
19 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the
20 Commissioner to demonstrate at step five that the claimant retains the capacity to make an
21 adjustment to work that exists in significant levels in the national economy. The ALJ also
22 addressed plaintiff's ability to perform other jobs if more restrictive limitations were imposed,

01 finding that plaintiff could work as an assembly worker, an office clerk, and a cleaner, thus
02 concluding that claimant was not disabled. (AR 476-77.)

03 This Court's review of the ALJ's decision is limited to whether the decision is in
04 accordance with the law and the findings supported by substantial evidence in the record as a
05 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
06 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
07 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
08 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
09 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
10 2002).

11 Plaintiff argues that the ALJ erred in reopening the favorable determination of her August
12 2000 disability application, contending that the determination was final unless reopened and
13 revised by the Commissioner. Plaintiff assigns error to the ALJ's failure to find her fibromyalgia,
14 post-traumatic stress disorder (PTSD), and depression to be severe impairments, and improper
15 rejection of the opinions of her treating physicians in so doing. Plaintiff objects to the manner in
16 which the ALJ found material drug abuse contributing to her disability. She further asserts that
17 the ALJ failed to address the lay opinion of her mother. Plaintiff argues that the hypothetical
18 posed to the vocational expert was incomplete, omitting the physical limitations and the limitation
19 on working with the public the ALJ found appropriate. Finally, plaintiff contends that the ALJ
20 improperly limited her counsel's cross-examination of the medical expert. For all of these reasons,
21 plaintiff maintains that the decision should be reversed for an award of benefits.

22 The Commissioner argues that the ALJ correctly reopened the August 2000 claim and

01 considered the entire period for which disability has been alleged by plaintiff, for the reason that
02 the issue of drug addiction or alcoholism (DAA) was not previously considered. The
03 Commissioner contends that the finding that plaintiff did not have a severe impairment of
04 fibromyalgia is supported by substantial evidence, that the ALJ, in fact, did accept the testimony
05 that plaintiff had both a depressive disorder and an anxiety disorder (which would include PTSD),
06 and that, at any rate, none of these impairment would have resulted in a different RFC finding.
07 The Commissioner asserts that the ALJ appropriately reasoned that plaintiff's DAA was material
08 to the finding of disability. The Commissioner takes the position that the ALJ gave appropriate
09 weight to the medical evidence, lay evidence, and plaintiff's testimony in determining her RFC.
10 The Commissioner argues that the hypothetical posed to the vocational expert was based on
11 substantial evidence in the record and was properly relied on by the ALJ, and contends that the
12 ALJ appropriately handled the testimony of the medical expert. The Commissioner maintains that
13 the decision is supported by substantial evidence and free of legal error, and should be affirmed.

14 Reopening of 1986 Application

15 In plaintiff's opening brief, apparently for the first time, she suggests that, if found disabled,
16 benefits should be awarded "based on the September 1, 1986 concurrent application." Plaintiff
17 bases this request on the allegedly deficient 1986 notice denying her claim, citing *Gonzalez v.*
18 *Sullivan*, 914 F.2d 1197 (9th Cir. 1990), in support. The Commissioner argues that the facts of
19 this case do not establish the due process violation that allowed the plaintiff in *Gonzalez* to reopen
20 a previous claim, and that this Court lacks jurisdiction to address the issue in the absence of a
21 request to reopen directed to the administrative agency.

22 The Commissioner's contention is well taken. Plaintiff acknowledges that, only if she

01 makes a “colorable constitutional claim that the decision not to reopen violates the due process
02 clause” does this Court have jurisdiction to consider the agency’s decision. *Id.* at 1203. Yet, here,
03 there is no such decision to address because plaintiff has not asked the agency to reopen the prior
04 claim. Furthermore, although plaintiff correctly points out that the 1986 notice denying her claim
05 did not specifically inform her of the consequences of failing to request a hearing (AR 1982-83),
06 that notice is not “like that received by Mr. Gonzalez.” *See Acquiescence Ruling 92-7(9)*. The
07 notice also differed from that in the *Gonzalez* case in that it did not create an inference that
08 reapplication could be an alternative to appeal. At any rate, in the absence of a request made to
09 the agency to reopen the application, this Court does not have jurisdiction to order an award of
10 benefits based on the 1986 application.

11 Reopening of August 2000 SSI Application

12 While this Court lacks jurisdiction to consider plaintiff’s 1986 application because of the
13 absence of any agency action to review, the contrary is true with regard to the 2000 application.
14 The ALJ chose to reopen plaintiff’s August 2000 application to address two issues not previously
15 considered: whether drug or alcohol abuse was a material factor in plaintiff’s impairment and
16 noncompliance with medical treatment. (AR 457.)

17 Plaintiff argues that the August 2000 application was administratively final and the ALJ
18 did not have jurisdiction to reopen it. The Commissioner takes the position that neither the
19 Appeals Council, nor the remand order from this Court precluded the ALJ from reviewing the
20 period covered by plaintiff’s 2000 claim, and that appealing claimants are specifically told that the
21 regulations allow any issues relating to a claim to be considered by an ALJ upon remand, “whether
22 or not they were raised in the administrative proceedings leading to the final decision in your

01 case.” 20 C.F.R. §§ 404.983, 416.1483 (“Any issues relating to your claim may be considered by
02 the administrative law judge whether or not they were raised in the administrative proceedings
03 leading to the final decision in your case.”) (emphasis added.) The Commissioner also cites 20
04 C.F.R. §§ 404.977(b), 416.1477(b), authorizing the ALJ to take “any additional action that is not
05 inconsistent with the Appeals Council’s remand order.”

06 Plaintiff’s 2000 claim had obviously not yet been filed at the time of the April 22, 1999
07 hearing, which resulted in the decision subject to appeal in this Court and the remand order. The
08 1999 hearing, pursuant to plaintiff’s request for a hearing (AR 145), was based on the
09 administrative denial of her 1994 and 1996 claims. (See AR 57-74 and 142-44.) Accordingly,
10 because the claim remanded to the ALJ by this Court was not plaintiff’s August 2000 claim, the
11 regulations cited by the Commissioner are unavailing.

12 The Commissioner also argues that consideration of the 2000 claim was appropriate as a
13 reopening of the application based on 20 C.F.R. §§ 404.987, *et seq.*, 416.1489, *et seq.* These
14 regulations authorize the reopening of an otherwise final determination of disability within twelve
15 months of the date of the notice of the initial determination for any reason, and within two years
16 (for SSI benefits) or four years (for DI benefits) of the date of the notice of the initial
17 determination upon a finding of “good cause.” *Id.* at §§ 404.988, 416.1488. Good cause includes
18 “new and material evidence being furnished, a clerical error, or a clear showing on the face of the
19 evidence that an error was made in making the determination.” *Id.* at §§ 404.989, 416.1489. The
20 Commissioner argues that the ALJ was justified in reopening the 2000 application because of the
21 “new evidence” provision. While the timeliness of the reopening is not at issue, plaintiff asserts
22 that the “good cause” standard was not met.

01 Upon remand by this Court, the ALJ notified plaintiff that a de novo review would be
02 conducted of the entire record, including the period covered by the August 2000 application. (AR
03 611.) The ALJ gave no reason for reopening this later claim. The Notice of Hearing referenced
04 only the 1994 and 1996 claims. (AR 616.)

05 The decision to reopen a prior claim can only be affirmed on the basis of the ALJ's stated
06 reasons. *Wyatt v. Barnhart*, 349 F.3d 983, 984 (7th Cir. 2003). *Accord Cole v. Barnhart*, 288
07 F.3d 149, 151 (5th Cir. 2002). Here, the ALJ set forth the reason for reopening the prior claim
08 in her March 25, 2004 decision:

09 The claimant submitted another claim for Supplemental Security payments on August
10 17, 2000. She was paid by Disability Determination Services or "DDS" on a later
11 application beginning in 1990 and is currently in pay status. However, this later
12 favorable finding (based on depression and post traumatic stress disorder) did not
13 evaluate the issue of significant drug and alcohol abuse and non-compliance. . . . A
de novo review is required to fully evaluate the claimant, which includes observation,
credibility evaluation, and examination by both myself and medical experts as well as
to evaluate the significant issues of substance abuse and non-compliance.

14 (AR 457.) The ALJ went on to state:

15 I reverse the DDS determination of disability, based on the application of August 20,
16 2000, as it did not review and evaluate the issues of drug and alcohol abuse and non-
compliance.

17 (AR 475.) At the hearing, there was some colloquy as to the basis for the de novo review. The
18 ALJ did not give a reason for the reopening other than stating: "So I think I have the authority
19 and that's why I'm doing it." (AR 486.) Although quizzing plaintiff to be sure she understood
20 "what's at stake here," the ALJ gave no reason for the de novo review. She at no time mentioned
21 the existence of new evidence as the reason for re-opening the 2000 application. Indeed, as
22 plaintiff suggests, the ALJ apparently conducted the de novo review for the sole reason that the

01 case had been remanded, warning plaintiff that her disability award could be set aside if she
02 continued “to go forward.” (AR 492.)

03 The grounds for reopening must be narrowly applied when the Commissioner proceeds
04 against a claimant. “Because errors can cause considerable hardship, the regulations should be
05 liberally applied in favor of beneficiaries.” *Dugan v. Sullivan*, 957 F.2d 1384, 1389 (7th Cir. 1992)
06 (recognizing the “special need for finality” in disability determinations). In this case, the
07 Commissioner argues that reopening was warranted in light of the materiality of new evidence
08 before the ALJ, pointing to new medical exhibits, plaintiff’s testimony, and the testimony of two
09 medical experts. While conceding that much of the evidence was “new” in the sense that it did not
10 exist when the 2000 claim was approved, plaintiff asserts that this evidence was not the basis for
11 the ALJ’s decision to reopen the claim because the ALJ had not yet seen the evidence.

12 The undersigned agrees with plaintiff’s position. The ALJ’s stated reasons fail to satisfy
13 the regulations. Accordingly, the reopening and denial of plaintiff’s August 2000 SSI claim for
14 benefits should be reversed and remanded with instructions to reinstate the initial favorable
15 determination granting benefits.

16 1994 and 1996 DI Applications

17 The ALJ’s decision also addressed the remand from this Court of plaintiff’s 1994 and 1996
18 applications for DI benefits as of her date last insured on September 30, 1996. The undersigned
19 addresses claims pertinent to those applications below.

20 A. Evaluation of Severe Impairments, including Chronic Pain and Mental Disorders

21 Step two of the sequential disability analysis requires the ALJ to make a determination as
22 to whether a claimant suffers from an impairment or combination of impairments that are “severe.”

01 In this case, the ALJ found as follows:

02 . . . The claimant has an impairment or a combination of impairments considered
03 “severe” based on the requirements in 20 CFR §§ 404.1520(c) and 416.920(b). The
04 claimant’s drug abuse is a material factor of her disability *without which* she is not
05 disabled.

06 . . . These medically determinable impairments do not meet or medically equal one of
07 the listed impairments in appendix 1, Subpart P, Regulation No. 4.

08 (AR 475-76 (emphasis in original.))

09 The ALJ’s findings do not specify what impairments were found to be severe. Although
10 the ALJ listed the existence of a number of impairments (“a kidney disorder, a heart condition, an
11 ovarian cyst, connective tissue disease, cervix cancer, chronic pain and mental problems[.]”), and
12 stated that none of them were “severe” (AR 459, 466), she contradicted the statement as to a heart
13 condition in concluding that the “cardiovascular issues” were severe “as the evidence supports
14 significant functional limitation.” (AR 467.) Further, although the ALJ found the kidney disorder,
15 ovarian cyst, cervix cancer, and connective tissue disease not severe (AR 467-68), she did not
16 specifically state whether the chronic pain and “mental problems” were severe. On remand,
17 the ALJ should make sufficiently specific findings as to which impairments are found to be severe
18 and which are not. Additionally, rather than referring generally to “mental problems,” the ALJ
19 should address specific mental conditions diagnosed, such as depressive disorder and anxiety
20 disorders.²

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22 ² The Commissioner’s contention that the ALJ “noted and accepted” the testimony of Dr.
Clemmons that plaintiff had both a depressive disorder and an anxiety disorder is not correct. (*See*
Dkt. 10 page 10.) No such finding appears in the ALJ’s decision.

01 B. Consideration of Drug Addiction and Alcoholism (DAA)

02 Contrary to the specific requirements of the regulations, the ALJ found plaintiff to have
03 “drug abuse” which was a material factor in her disability before actually finding her to be disabled.
04 *See* 20 C.F.R. §§ 404.1535(a), 416.935(a) (“If we find that you are disabled and have medical
05 evidence of your drug addiction or alcoholism, we must determine whether your drug addiction
06 or alcoholism is a contributing factor material to the determination of disability.”) (emphasis
07 added). The Commissioner apparently recognizes this inadequacy by attempting to assert that the
08 ALJ accepted the opinion of the consulting doctor that plaintiff met the requirements for mental
09 Listing 12.04. (*See* Dkt. 10 at 11.) Yet, that assertion is flatly contradicted by the record – the
10 ALJ at no time made a finding that plaintiff met any of the mental impairment listings and, in fact,
11 noted with apparent approval Dr. Clemmon’s testimony that the medical records do not support
12 a meeting or equaling of any mental impairment listing. (AR 470.) The ALJ stated unequivocally
13 that none of plaintiff’s impairments, including her “mental problems,” were sufficiently severe to
14 meet or medically equal, either singly or in combination, one of the listing of impairments in
15 Appendix 1, Subpart P, Regulations No. 4. (AR 466.)

16 A failure to determine whether a claimant is disabled using the five-step sequential analysis
17 without separating out the impact of drug addiction and alcoholism precludes a finding that such
18 drug addiction or alcoholism is a contributing factor in the claimant’s disability. *Bustamante v.*
19 *Massanari*, 262 F.3d 949, 955 (9th Cir. 2001). Accordingly, the finding that drug abuse was a
20 material factor in plaintiff’s disability should be reversed and remanded with instructions that the
21 ALJ complete the full five-step sequential analysis of disability before addressing the materiality
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01 of any drug addiction or alcoholism.³

02 It also appears that the opinion of the treating doctor, Dr. Gustafson, is incomplete with
03 regard to the issue of substance addiction. The ALJ criticized the inadequacy of these records in
04 her decision. (AR 470.) However, the ALJ has an affirmative duty to assist the claimant in
05 developing the record at every step of the inquiry. *Bustamante*, 262 F.3d at 954. On remand, the
06 ALJ should clarify the opinion of Dr. Gustafson regarding any possible addiction disorder. The
07 ALJ should also consider and give proper weight to the opinions of plaintiff's other treating
08 doctors on the issue of a possible addiction disorder, including Drs. Holman and Taylor. If the
09 record is not adequate to ascertain the opinions of the treating doctors, the ALJ should supplement
10 the record by asking the doctors to clarify their opinions.⁴ In considering the absence or presence
11 of "drug seeking behavior," the ALJ should consider Social Security Ruling (SSR) 96-7p, which
12 states that persistent attempts by the individual to obtain relief of pain or other symptoms generally
13 lend support to an individual's allegations of intense and persistent symptoms.

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16 ³ It is concerning that the ALJ repeatedly refers to "drug and alcohol abuse" (*see* AR 457,
17 469, 470, 475), rather than evaluating the medical evidence of drug addiction or alcoholism as
18 specified in the regulation. *See* 20 C.F.R. §§ 404.1535, 416.935. On remand, the ALJ should
19 perform a proper evaluation of the absence or presence of these conditions as specified in the
regulations and the materiality of those conditions, if present, to the determination of plaintiff's
disability.

20 ⁴ *See* Social Security Ruling (SSR) 99-2p ("If the adjudicator finds the evidence is
21 inadequate to determine whether the individual is disabled, he or she must first recontact the
22 individual's treating or other medical source(s) to determine whether the additional information
needed is readily available, in accordance with 20 CFR 404.1512 and 416.912."); 20 C.F.R. §
416.912(e) ("We will seek additional evidence or clarification from your medical source when the
report from your medical source contains a conflict or ambiguity that must be resolved. . . .")

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01 C. Evaluation of fibromyalgia

02 Plaintiff asserts error at step two in the ALJ's failure to find her fibromyalgia severe. At
03 step two, plaintiff must make a threshold showing that her medically determinable impairments
04 significantly limit her ability to perform basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137,
05 145 (1987) and 20 C.F.R. § 416.920(c). "Basic work activities" refers to "the abilities and
06 aptitudes necessary to do most jobs." 20 C.F.R. § 416.921(b). "An impairment or combination
07 of impairments can be found 'not severe' only if the evidence establishes a slight abnormality that
08 has 'no more than a minimal effect on an individual's ability to work.'" *Smolen v. Chater*, 80 F.3d
09 1273, 1290 (9th Cir. 1996) (quoting SSR 85-28). "[T]he step two inquiry is a de minimis
10 screening device to dispose of groundless claims." *Id.* (citing *Bowen*, 482 U.S. at 153-54). An
11 ALJ is also required to consider the "combined effect" of an individual's impairments in
12 considering severity. *Id.*

13 Plaintiff argues that, in failing to find this impairment severe, the ALJ improperly rejected
14 the opinions of her treating doctors. In general, more weight should be given to the opinion of
15 a treating physician than to a non-treating physician, and more weight to the opinion of an
16 examining physician than to a non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th
17 Cir. 1996). *See also Smolen*, 80 F.3d at 1285 (the opinions of specialists related to their areas of
18 specialization are given more weight than the opinions of non-specialists). Where not contradicted
19 by another physician, a treating or examining physician's opinion may be rejected only for "clear
20 and convincing" reasons. *Lester*, 81 F.3d at 830 (quoting *Baxter v. Sullivan*, 923 F.2d 1391,
21 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not
22 be rejected without "specific and legitimate reasons" supported by substantial evidence in the

01 record for so doing.” *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.
02 1983)). Where the opinion of the treating physician is contradicted, and the non-treating
03 physician’s opinion is based on independent clinical findings that differ from those of the treating
04 physician, the opinion of the non-treating physician may itself constitute substantial evidence. *See*
05 *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995). It is the sole province of the ALJ to
06 resolve this conflict. *Id.*

07 “Where the Commissioner fails to provide adequate reasons for rejecting the opinion of
08 a treating or examining physician, [the Court credits] that opinion as ‘a matter of law.’” *Lester*,
09 81 F.3d at 830-34 (finding that, if doctors’ opinions and plaintiff’s testimony were credited as true,
10 plaintiff’s condition met a listing) (quoting *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir.
11 1989)). Crediting an opinion as a matter of law is appropriate when, taking that opinion as true,
12 the evidence supports a finding of disability. *See, e.g., Schneider v. Commissioner of Social Sec.*
13 *Admin.*, 223 F.3d 968, 976 (9th Cir. 2000) (“When the lay evidence that the ALJ rejected is given
14 the effect required by the federal regulations, it becomes clear that the severity of [plaintiff’s]
15 functional limitations is sufficient to meet or equal [a listing.]”); *Smolen*, 80 F.3d at 1292 (ALJ’s
16 reasoning for rejecting subjective symptom testimony, physicians’ opinions, and lay testimony
17 legally insufficient; finding record fully developed and disability finding clearly required).

18 However, courts retain flexibility in applying this “‘crediting as true’ theory.” *Connett v.*
19 *Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further determinations where there
20 were insufficient findings as to whether plaintiff’s testimony should be credited as true). As stated
21 by one district court: “In some cases, automatic reversal would bestow a benefits windfall upon
22 an undeserving, able claimant.” *Barbato v. Commissioner of SSA*, 923 F. Supp. 1273, 1278 (C.D.

01 Cal. 1996) (remanding for further proceedings where the ALJ made a good faith error, in that
02 some of his stated reasons for rejecting a physician's opinion were legally insufficient).

03 The Ninth Circuit Court of Appeals described fibromyalgia as follows:

04 "[F]ibromyalgia's] cause or causes are unknown, there is no cure, and, of greatest
05 importance to disability law, its symptoms are entirely subjective. There are no
06 laboratory tests for the presence or severity of fibromyalgia. The principal symptoms
07 are 'pain all over,' fatigue, disturbed sleep, stiffness, and 'the only symptom that
08 discriminates between it and other diseases of a rheumatic character' multiple tender
spots, more precisely 18 fixed locations on the body (and the rule of thumb is that the
patient must have at least 11 of them to be diagnosed as having fibromyalgia) that
when pressed firmly cause the patient to flinch."

09 *Rollins v. Massanari*, 261 F.3d 853, 855 (9th Cir. 2001) (quoting *Sarchet v. Chater*, 78 F.3d 305,
10 306 (7th Cir. 1996)). SSR 99-2p likewise points to the significance of tender points to a
11 fibromyalgia diagnosis. SSR 99-2p at n.3 ("Individuals with impairments that fulfill the American
12 College of Rheumatology criteria for [fibromyalgia] (which includes a minimum number of tender
13 points) may also fulfill the criteria for [chronic fatigue syndrome].")

14 Plaintiff argues that, in concluding that her fibromyalgia is not severe, the ALJ
15 mischaracterized and improperly rejected the medical opinions of Dr. Holman, her treating
16 rheumatologist, in favor of the opinion of the consulting medical expert, Dr. Nelp. In support of
17 her argument, plaintiff notes the consistent diagnosis of fibromyalgia by Dr. Holman, as well as
18 the presence of trigger points. (AR 1689-90.) Dr. Nelp, on the other hand, testified that he did
19 not have an opinion as to the fibromyalgia diagnosis and, in fact, apparently questioned the very
20 existence of such a condition. (AR 545.) ⁵ With no discussion of Dr. Holman's opinion or

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22 ⁵ The ALJ frustrated the attempt by counsel for plaintiff to explore Dr. Nelps' opinion that
fibromyalgia is a "controversial diagnosis as far as some people use it and some people don't."

01 explanation for rejecting his diagnosis, the ALJ adopted Dr. Nelp's opinion that plaintiff had no
02 objective evidence of fibromyalgia, consisting of trigger points, swelling, or sensory changes, and,
03 thus, that this condition was not severe.

04 The ALJ's step two determination as it relates to fibromyalgia is not supported by
05 substantial evidence. Contrary to the conclusion reached by the ALJ, the record contains evidence
06 supporting the existence of an impairment meeting the diagnostic criteria of fibromyalgia. Yet,
07 even taking the opinions of plaintiff's treating rheumatologists as true, the record does not support
08 a finding of disability as a result of plaintiff's fibromyalgia. Accordingly, on remand, the ALJ
09 should reassess plaintiff's fibromyalgia at step two and its effect on her RFC.

10 D. Lay Witness Statement

11 The Ninth Circuit has held that "[l]ay testimony as to a claimant's symptoms is competent
12 evidence that an ALJ must take into account, unless he or she expressly determines to disregard
13 such testimony and gives reasons germane to each witness for doing so." *Lewis v. Apfel*, 236 F.3d
14 503, 511 (9th Cir. 2001). Here, the ALJ failed to discuss the statement submitted by plaintiff's
15 mother, Beverly Esperum. (See AR 777-88.) As such, on remand, the ALJ should appropriately
16 address the statement of plaintiff's mother.

17 E. Cross-Examination of Consulting Expert

18 Dr. Clemmons, one of the medical consulting experts, testified by phone. After answering
19 questions posed by the ALJ, plaintiff's attorney questioned Dr. Clemmons. As demonstrated
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21 (AR 545.) The clear inference, however, is that Dr. Nelp did not accept the condition as a
22 legitimate diagnosis. Such an opinion is not accepted by either the Social Security Administration
or this Circuit. See SSR 99-2p at n.3 and *Rollins*, 261 F.3d at 855.

below, from the beginning, the ALJ pressed the attorney:

ALJ: Okay. Counsel, prepare your questions because we're going to go quickly on this. Okay? So be prepared. Why don't we go off the record for five minutes.

(At this point, the Administrative Law Judge went off the record.)

(On the record.)

ALJ: Back on the record. Okay, we're back. All right. Go ahead, Counsel, ask your questions.

ATTY: Thank you. Your Honor. Just a second, Dr. Clemmons.

ME2: Sure.

ALJ: Well we don't have too much time here, Counsel. Are you ready or not?

ATTY: Dr. Clemmons, would you agree that the central element of a somatoform disorder is that the person believes she has the impairment?

(AR 571.) After a few questions, the ALJ interrupted:

ALJ: Well, what's your question of the doctor, Counsel? We can read it. What's your question?

(AR 574.) The ALJ took over the questioning at one point:

ALJ: Well why don't we ask specific to this case. Well Doctor, let's look at it specific to this case. Mr. Fields, that's why we are here. Do you think there's malingering?

(AR 576.) Finally, the ALJ took to repeatedly interrupting the attorney.

ATTY: Well, do you recall reviewing Dr. Haney's report?

ALJ: Well, what's your question about it, Counsel, it says that.

ME2: I have 152 records here.

ATTY: Did you make any notes regarding Dr. Haney's report?

ALJ: Counsel, what is your question about the report? It says what is says. Now what's your question to him?

ATTY: I want to ask if he disagrees with the diagnosis of the pain disorder and whether he agrees that it's well documented in the record as Dr. Haney indicates.

ALJ: Do you agree with the diagnosis of a pain disorder, Doctor?

ME2: Well, yeah, I don't disagree with that.

(AR 577.) A few questions later, the ALJ terminated the questioning:

ALJ: Ask your question, Mr. Fields. This is your last question. I've got to hear from the vocational expert. We've got to wrap this up.

(AR 578.) Finally, after stating, "You're finished, Counsel[.]" the ALJ terminated the phone call.

(AR 579-80.)

After the hearing, plaintiff's counsel wrote to the ALJ to object to not being permitted to fully cross-examine Dr. Clemmons. (AR 646-47.) Absent that opportunity, counsel asked that the testimony be stricken from the record or given no weight. In response, the ALJ stated that the questioning was irrelevant and scattered, and the hearing had already gone on too long. (AR 648-49.)

The failure to allow adequate cross-examination was one of the grounds cited by the Appeals Council in the previous remand of this case for a second ALJ hearing. (AR 603.) As the Appeals Council pointed out, the ALJ relied extensively on the expert's opinion in denying disability, yet denied counsel the opportunity for adequate cross examination. Unfortunately, the ALJ repeated this error at the second hearing.

01 As the ALJ noted (AR 648), the medical exhibits in this case are extensive. The
02 administrative record consists of more than two thousand pages, most of which are medical
03 records. Plaintiff's counsel heard the opinion of Dr. Clemmons for the first time when he testified
04 by speaker phone at the hearing.⁶ The areas of inquiry being pursued by counsel were relevant to
05 the relationship between plaintiff's reports of pain and the diagnosis of pain disorder. Ultimately,
06 the analysis of plaintiff's credibility was a central component of the ALJ's findings.

07 Plaintiff was denied due process by being deprived of the opportunity for meaningful cross-
08 examination of the consulting medical expert. If the scheduled hearing time was inadequate,
09 additional time should have been scheduled for a later date. The testimony of Dr. Clemmons
10 should be stricken and the evidence re-weighted without his testimony. If the opinion of another
11 consulting expert is obtained, plaintiff's attorney must be allowed the opportunity for reasonable
12 cross-examination.

13 F. Assessment of RFC

14 Plaintiff argues that the ALJ did not follow the directions of the Appeals Council to specify
15 how long she can sit, stand or walk in an eight-hour day. However, in her decision, the ALJ's
16 description of plaintiff's exertional functional capacity met those instructions:

17 The claimant has the exertional residual functional capacity for a full range of light
18 work. Specifically, she can occasionally lift and/or carry 20 pounds, frequently lift
19 and/carry 10 pounds, stand and/or walk about 6 hours in an 8-hour workday, and sit
20 about 6 hours in an 8-hour workday.

(AR 476.)

21 ⁶ Plaintiff's argument that the expert should have been required to testify live rather than
22 by speaker phone is unavailing. Plaintiff makes no showing she was prejudiced by having the
testimony presented in this manner.

01 Yet, the hypothetical posed to the vocational expert at the hearing simply asked the expert
02 to assume a limitation to the “full range of light activity.” (AR 582.) A hypothetical posed to a
03 vocational expert must include all of the claimant’s functional limitations supported by the record.
04 *Thomas*, 278 F.3d at 956 (citing *Flores v. Shalala*, 49 F.3d 562, 520-71 (9th Cir. 1995)). A
05 vocational expert’s testimony based on an incomplete hypothetical lacks evidentiary value to
06 support a finding that a claimant can perform jobs in the national economy. *Matthews v. Shalala*,
07 10 F.3d 678, 681 (9th Cir. 1993) (citing *DeLorme v. Sullivan*, 924 F.2d 841, 850 (9th Cir. 1991)).
08 Without a showing that the vocational expert’s definition of “light activity” coincided with the
09 definition assumed by the ALJ, the findings at step four and five of the sequential analysis lack
10 substantial evidence.

11 The ALJ also included non-exertional limitations in the hypothetical consisting of
12 occasional contact with the public up to thirty percent of the time and routine repetitive tasks.
13 (AR 582.) The expert testified that, while plaintiff’s past work would be eliminated, she would
14 be able to perform other work existing in significant numbers in the national economy. (AR 582-
15 85.) The ALJ posed a second hypothetical assuming unlimited public contact and involving
16 simple, routine tasks. The vocational expert testified that plaintiff would be able to perform her
17 past work as a waitress and many cashier jobs with these limitations. (AR 585-86.)

18 The errors identified above with respect to the consideration of plaintiff’s fibromyalgia, the
19 existence of mental disorders such as depression and anxiety disorder, and the assessment of the
20 opinions of plaintiff’s treating physicians also implicate the ALJ’s assessment of these physicians’
21 opinions with respect to plaintiff’s RFC. The ALJ should re-evaluate plaintiff’s RFC for purposes
22 of steps four and five of the sequential analysis, obtaining additional vocational testimony if

01 necessary.

02 G. Plaintiff's Credibility

03 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to
04 reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See*
05 *also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony unreliable, an
06 ALJ must render a credibility determination with sufficiently specific findings, supported by
07 substantial evidence. "General findings are insufficient; rather, the ALJ must identify what
08 testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81
09 F.3d at 834. "We require the ALJ to build an accurate and logical bridge from the evidence to her
10 conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings."
11 *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the
12 ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between
13 his testimony and his conduct, his daily activities, his work record, and testimony from physicians
14 and third parties concerning the nature, severity, and effect of the symptoms of which he
15 complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

16 To the extent the above-described errors implicate the ALJ's credibility assessment, the
17 ALJ should reassess plaintiff's credibility on remand.

18 H. Nature of Remand

19 The Court has discretion to remand for further proceedings or to award benefits. *See*
20 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of benefits
21 where "the record has been fully developed and further administrative proceedings would serve
22 no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002).

01 Such a circumstance arises when: (1) the ALJ has failed to provide legally sufficient
02 reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that
03 must be resolved before a determination of disability can be made; and (3) it is clear
from the record that the ALJ would be required to find the claimant disabled if he
considered the claimant's evidence.

04 *Id.* at 1076-77.

05 In this case, the record as it stands does not compel a finding of disability. While plaintiff's
06 credibility may need to be re-assessed based on the errors identified herein, the Commissioner cites
07 a number of factors present in the record that, if resolved against plaintiff, may legitimately impact
08 her credibility, including a criminal conviction for a charge of false swearing in obtaining public
09 assistance benefits, alleged untruthfulness about drug use, her current part-time employment as
10 a waitress, her work record in general, and the allegation that she failed to follow medical advice.⁷
11 Therefore, the proper remedy is a remand for further proceedings, rather than for an award of
12 benefits. The undersigned further recommends that, on remand, the matter should be assigned to
13 a different ALJ.

14 CONCLUSION

15 For the reasons described above, this matter should be REMANDED for further
16 administrative proceedings. Specifically, the reopening and denial of plaintiff's August 2000 SSI
17 claim for benefits should be reversed and remanded with instructions to reinstate the initial

18
19 ⁷ The Commissioner correctly notes that a lack of justification for following treatment as
20 prescribed may affect the credibility of a claimant, even if the failure to follow treatment does not
21 rise to the level of justifying a complete denial of benefits. 20 C.F.R. §§ 404.1530, 416.920.
22 "However, the adjudicator must not draw any inferences about an individual's symptoms and their
functional effects from a failure to seek or pursue regular medical treatment without first
considering any explanations that the individual may provide, or other information in the case
record, that may explain infrequent or irregular medical visits or failure to seek medical treatment."
SSR 96-7p at 7.

01 favorable determination granting benefits. Plaintiff's 1994 and 1996 DI claims should be
02 remanded to specify which impairments are found to be severe, including specific mental
03 diagnoses. A complete five-step sequential analysis of plaintiff's disability should be conducted
04 before addressing the materiality of any drug addiction or alcoholism. If the DAA issue is reached,
05 the opinions of the treating doctors must be considered, as well as SSR 96-7p. The finding that
06 plaintiff's fibromyalgia is not a severe impairment is not supported by substantial evidence and
07 should be reversed. The ALJ should discuss the effect of plaintiff's fibromyalgia and other severe
08 impairments on her RFC. The ALJ should appropriately address the lay witness statement. The
09 testimony of Dr. Clemmons should be stricken and, if the opinion of another medical consulting
10 expert is obtained, plaintiff's counsel should be afforded the opportunity for reasonable cross
11 examination. The step four and step five analysis should be re-assessed based on the errors in the
12 hypothetical posed to the vocational expert, and to the extent that the re-consideration of
13 plaintiff's severe impairments implicate her RFC. If necessary, additional vocational testimony
14 should be obtained. To the extent the above-described errors implicate the ALJ's credibility
15 assessment, the ALJ should reassess plaintiff's credibility on remand. Finally, on remand, it is
16 recommended that the matter be assigned to a different ALJ.

17 A proposed order accompanies this Report and Recommendation.

18 DATED this 10th day of February, 2006.

19 
20 Mary Alice Theiler
21 United States Magistrate Judge
22